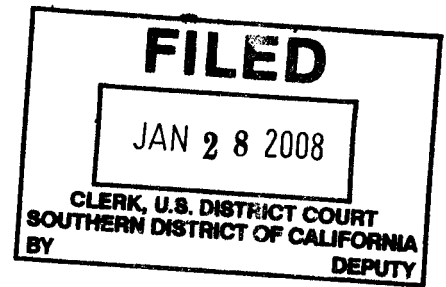


ORIGINAL



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

REGINO GUERRERO-MEDRANO,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Cr. No. 07-0266GT  
Cv. No. 07-0798GT

**ORDER**

On April 30, 2007, Petitioner, Regino Guerrero-Medrano ("Mr. Guerrero"), filed a Motion to Modify Sentence, presumably pursuant to 28 U.S.C. § 2255. Mr. Guerrero requests a two level downward departure based on his status as a deportable alien, which Mr. Guerrero asserts "should have been considered as a mitigating factor" at his sentencing. The Court has fully considered this matter, including a review of Mr. Guerrero's brief filed, the authorities cited therein and the arguments presented. For the reasons stated below, Mr. Guerrero's Motion to Modify Sentence is **DENIED**.

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1 First, Mr. Guerrero pled guilty, pursuant to a written plea agreement, to one count of deported  
 2 alien found in the United States, in violation of 8 U.S.C. § 1326. In the written plea agreement,  
 3 Mr. Guerrero explicitly waived his right to appeal and/or collaterally attack his conviction or  
 4 sentence. The Ninth Circuit has long acknowledged that the terms of a plea agreement are  
 5 enforceable. *See, United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996), *cert. denied*, 117  
 6 S.Ct. 1282 (1997). Since Mr. Guerrero expressly waived his statutory right to appeal or collaterally  
 7 attack his sentence in his plea agreement, Mr. Guerrero is now precluded from challenging that  
 8 sentence pursuant to 28 U.S.C. § 2255. *See, United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.  
 9 1993) (holding that a knowing and voluntary waiver of a statutory right is enforceable).

10 Moreover, even if Mr. Guerrero had not expressly waived his right to appeal or  
 11 collaterally attack his sentence, his petition would still fail. In essence, Mr. Guerrero argues  
 12 that because of his status as a deportable alien, he is "ineligible[] for pre-release custody and  
 13 minimum security confinement." However, Mr. Guerrero's argument that the Court should  
 14 depart downward because he is a deportable alien is precluded by statute and current Ninth  
 15 Circuit case law. By statute, the Court may depart downward only if there are "aggravating or  
 16 mitigating circumstances . . . not adequately taken into consideration by the Sentencing  
 17 Commission." 18 U.S.C. § 3553(b). Specifically, the Ninth Circuit has held that the threat of  
 18 deportation is not a factor that the district court may consider for sentencing purposes. *United*  
 19 *States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990).<sup>1</sup> Accordingly,

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 26 <sup>1</sup> The Ninth Circuit decided, in an unpublished opinion, that the defendant, like Limon, was not  
 27 entitled to a six month reduction in his sentence under 18 U.S.C. § 3553(b) because as a  
 28 deportable alien he is not eligible to spend the last six months of his sentence in a half way  
 house pursuant to 18 U.S.C. § 3624(c). *See United States v. Zepeda-Valles*, 87 F.3d 1325 (9th  
 Cir. 1996).

1           **IT IS ORDERED** that Mr. Guerrero's Motion to Modify Sentence is **DENIED**.

2           **IT IS SO ORDERED.**

3  
4           1-24-08  
5           date

6             
7           GORDON THOMPSON, JR.  
8           United States District Judge

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10           cc: AUSA Bruce Castetter

11           Petitioner  
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